

1 US BEVERAGE, INC.,

2 Plaintiff,

3 v.

4 JOHN BUSTER WALKER, II, and TRIDENT MARKETING,

5 INC.,

6 Defendants.

7 -----
8 JOHN BUSTER WALKER, II, and TRIDENT MARKETING,

9 INC.,

10 Counterclaim Defendants,

11 and

12 GRADY DOWLING KITTRELL, THOMAS GOING CLARK,

13 III, and NORMAN "BUDDY" TODD,

14 Third Party Defendants.

15
16 CIVIL ACTION NO.

17 2:06-CV-496-SRW

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20
21 DEPONENT: Grady Dowling Kittrell

22 DATE: September 15, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

US BEVERAGE, INC.,
Plaintiff,

vs.
JOHN BUSTER WALKER,
II, and TRIDENT
MARKETING, INC.,
Defendants. CIVIL ACTION NO.
2:06-CV-496-SRW

JOHN BUSTER WALKER,
II, and TRIDENT
MARKETING, INC.,
Counterclaim
Plaintiffs,

vs.
US BEVERAGE, INC.,
Counterclaim
Defendant,

and
GRADY DOWLING
KITRELL, THOMAS
GOING CLARK, III, and
NORMAN "BUDDY" TODD,
Third Party
Defendants.

DEPOSITION OF GRADY DOWLING KITRELL,
taken pursuant to notice and stipulation on
behalf of the Defendant/Counterclaim
Plaintiffs, in the Law Offices of Copeland,
Franco, Screws & Gill, 444 South Perry Street,
Montgomery, Alabama, before Tiffany B.
Beasley, Certified Court Reporter and Notary
Public in and for the State of Alabama at
Large, on September 15, 2006, commencing at
8:39 a.m.

APPEARANCES

FOR THE PLAINTIFF/COUNTERCLAIM DEFENDANT/THIRD
PARTY DEFENDANTS:

C. NELSON GILL, ESQUIRE

Copeland, Franco, Screws & Gill

444 South Perry Street

Montgomery, Alabama 36104

FOR THE DEFENDANTS/COUNTERCLAIM PLAINTIFFS:

RAYMOND L. JACKSON, JR., ESQUIRE

CLIFF TUNNELL

660 North College Street

Suite D

Auburn, Alabama 36830

ALSO PRESENT:

THOMAS GOING CLARK, III

JOHN BUSTER WALKER, II

STIPULATIONS

It is stipulated and agreed by and
between counsel representing the parties that
the deposition of **GRADY DOWLING KITRELL** may
be taken before Tiffany B. Beasley, Certified
Court Reporter and Notary Public in and for
the State of Alabama at Large, without the
formality of a commission; and all formality
with respect to other procedural requirements
is waived; that objections to questions, other
than objections as to the form of the
questions, need not be made at this time, but
may be reserved for a ruling at such time as
the deposition may be offered in evidence or
used for any other purpose by either party as
provided by the Federal Rules of Civil
Procedure.

It is further stipulated and agreed by
and between the parties hereto and the
witness, that the signature of the witness to
this deposition is hereby waived.

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one that we had all gone and met with. We had agreed to allocate some resources but not millions of dollars. We just didn't think that was a necessary function. We just didn't think that the brand development was going to cost that much. The value of the brand is based on the marketing and distribution of the brand.

Q. Is it your testimony today that John Walker asked the company to invest millions of dollars toward the creation of a brand?

A. No. I said we did not feel that we needed to.

Q. Okay. Well, I'm asking you what your recollection is of what Mr. Walker asked in terms of financial resources from US Beverage to help to create a brand.

A. I would say that the initial discussions were in excess of \$5,000.

Q. And you thought a \$5,000 investment in a new brand was excessive?

A. I thought that the way that he wanted to allocate the funds could be perceived to be excessive. I thought we could have come up

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with several names to start exploring development of, as opposed to paying a Ryan Hamner or someone 5,000 just for a logo.

Q. And is that your testimony, that he proposed to just spend \$5,000 paying Ryan Hamner, and that was the only thing he proposed to you in terms of --

MR. GILL: Object to the form.

A. No. That would not be. I've misstated that.

Q. Okay. Well, and I misunderstood you, so you can clarify that.

A. We did not feel that the amount of money was necessarily the issue. We felt that the amount of focus that John Walker wanted to designate to that project was a little -- we still felt he needed to be selling day to day and working on that project in his spare time, not that that became the focus; that those resources were better used day to day making sure that our accounts were taken care of; that the cash flow of the business was secure so that we could pay our bills and continue to grow and then develop a brand through that.

Q. Okay. Just to make sure I understand, I guess at some point there was a decision made that US Beverage, first, doesn't want to spend the money that Mr. Walker had proposed, or however he had budgeted the money; and, secondly, that the other members of the company wanted Mr. Walker to spend his time on developing customers rather than developing a new brand; is that --

MR. GILL: Object to the form.

A. No, that's not accurate.

Q. Okay. Well --

A. We feel that the majority of his time should have been spent on the day-to-day business that US Beverage was engaged in. But that the marketing is a very essential part of what we do. We are nothing more than a marketing company. That is what we do. We take a product; we go to the streets and we market and we sell; and then we distribute. It's all a function of marketing. We felt that a brand was important to us, but at the time when you cannot pay your bills, the most important

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thing -- not to lessen the importance of a brand -- but the most important thing was to continue the path that we had all signed off on and to develop the brand as an addition to the marketing plan, not that the sole function of John Walker came to be a brand-development manager. That was not the direction we wanted to go.

Q. When did you first hear the name Juice Alive?

A. I would say the first recollection I have of Juice Alive as a name would have been at the time -- I could not give you a definite date on that.

Q. Did you come up with the name Juice Alive?

A. No.

Q. What about Mr. Clark; do you think he -- are you contending he came up with the name Juice Alive?

A. I do not think he did.

Q. Well, do you think the first time you heard about the name Juice Alive would have been from John Walker?

A. Yes, I believe that.

1 whole list. I thought you said when I was
2 first made aware.

3 Q. Well, I asked when you -- I asked for the
first instance, and we're trying to work our
way forward. And then you said you couldn't
put it in a timeline form. So I just asked
you generally to list for us.

8 A. The Mississippi trade show was a big incident
we felt of competition. John Walker, in fact,
brought his agents down for the sole purpose
of competing directly with us at that trade
show. Had secured their own booth. And we
were advised to that by the trade show people,
and I contacted Mr. Walker about that. I
said, John, you know, in the middle of these
negotiations, this would be a bad time for you
to create a wedge between our negotiations
that way by blatantly competing with us at an
open trade show.

20 Q. When did that occur?

21 A. It was the Mississippi trade show for last
year. Probably last -- last fall sometime.

23 Q. Did you lose any sales as a result of this

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alleged competition?

2 A. On that date?

3 Q. Just as a result of what happened --

4 A. Oh, yes. We feel that our price point has
been driven down by the threat of Mr. Walker
bidding; the information that he has passed to
competitors of ours based on what he calls the
Trident Marketing association with Dispensing
Systems; we feel that our bids have been
damaged tremendously. We have lost pieces of
business due to him creating a competitive
entity. So, yes, we do feel that we've lost
business and lost revenues, an enormous amount
of revenues due to this competition.

15 Q. Could you put a dollar figure on this enormous
amount of revenues?

17 A. I could not today.

18 Q. What would it take for you to be able to
quantify this?

21 A. I would need time to go through an account
list.

22 Q. Did Mr. Walker give you leads that occurred
during the Mississippi trade show or give US

Beverage leads?

2 A. At that point, when we -- when we had let
Mr. Walker know that we saw this as an act of
aggression. And we sat down at that trade
show in a conference room at a hotel to try to
work some things out. And, again, it has
always been our intention to put the business
first and protect it, US Beverage, because it
can't speak for itself. So we as corporate
officers have to speak for it, and sometimes
we do have to put the needs of the company
ahead of our personal needs. And in doing so,
we did agree to some things that we felt we
were coerced into for the protection of the
greater good of US Beverage.

On that date we made what we
felt was an amicable good-faith arrangement,
which he breached on many occasions. Did he
give us leads? We were there at the show
and got the leads alongside him because he was
in the booth with us. So did he give us
leads? No. He went out and actively bid
against us during that school year and this

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school year through his agents.

2 Q. Okay. Now, which school years are we talking
about? You said "that school year." Are you
referring to 2005/2006?

5 A. Correct.

6 Q. Which schools did he bid against you in
2005/2006?

8 A. And, again, I'll have to -- I'll have to
look -- he may not have bid actively in 2005,
but he was making contact in 2006 to create a
path for him to sell to these accounts, which
would have been the 2005/2006 school year. So
spring of '06 he was out actively trying to
create a distributor network, and agents for
John Walker doing business as Juice Alive and
Trident Marketing to infiltrate territories
that US Beverage currently distributed in and
compete with us.

19 Q. What was your response or your company's
response to these perceived instances of
competition that you've listed a few minutes
ago?

23 A. What was our response?

1 Q. As of April 20, 2006, were you aware that

2 Tiffany Walker was pregnant at that time?

3 A. **Yes, I was.**

Q. Did you authorize Mr. Edmondson to send this letter?

6 A. **Yes, I did.**

7 Q. Did it not concern you to terminate health benefits for someone who's pregnant?

9 MR. GILL: Object to form.

10 A. **It concerned me that US Beverage, which my**
 11 **responsibility as a corporate officer to**
 12 **protect, was under attack, and, yes, it does**
 13 **concern me that she's a human and may have**
 14 **health rights.**

15 Q. Let's move on. And just to finish up what we
 16 had asked a few minutes ago, after Mr. Walker
 17 told you that, no, he was not going to turn
 18 the accounts in North Carolina, the schools,
 19 over to you -- and I've asked you before, but
 20 is it your testimony today that you didn't
 21 take any legal action -- and, again, I'm not
 22 talking about talking to your attorney; I'm
 23 talking about some sort of legal action toward

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1 Mr. Walker -- until 2006?

2 MR. GILL: Object to the form. I
 3 mean, I think that the legal
 4 action speaks for itself.

5 But go ahead and answer
 6 it.

7 A. **I'm not sure -- when you say "took legal**
 8 **action" --**

9 Q. Well, I'm talking about -- and let me define
 10 that. In terms of legal action, I'm talking
 11 about any sort of action directed toward
 12 Mr. Walker legally, whether it's a
 13 cease-and-desist letter; a lawsuit filed in
 14 any state; there's an attempt to get a court
 15 order, any type of action legally toward
 16 Mr. Walker. And, again, I'm not talking about
 17 talking to your attorney. I don't care what
 18 you and your attorney said to each other.

19 MR. GILL: Object to the form.

20 A. **Well, again, we sought advice of counsel as to**
 21 **how to proceed and formulated a strategy to**
 22 **act on so that we would be judicious and that**
 23 **we would try to protect the company in every**

1 **means possible in that strategy.**

2 Q. In 2004 did you send a cease-and-desist letter
 3 to Mr. Walker telling him to stop doing
 4 business in North Carolina?

5 A. **I do not believe I did.**

6 Q. In 2005 did you send a cease-and-desist letter
 7 or have anyone else send a cease-and-desist
 8 letter to Mr. Walker asking him to stop doing
 9 business in the state of North Carolina?

10 A. **I do not believe we did.**

11 Q. Okay. What about in 2006? Prior to the
 12 filing of this lawsuit, do you recall a
 13 cease-and-desist letter, any cease-and-desist
 14 letter being sent by any attorney or by you or
 15 anyone else on behalf of US Beverage?

16 A. **I do not recall.**

17 Q. Okay. What about prior to this lawsuit? Was
 18 there any other litigation filed anywhere, you
 19 know, whether it's by this attorney or
 20 Mr. Edmondson or anyone else, involving John
 21 Walker and US Beverage?

22 MR. GILL: Is the question, had he
 23 filed a prior lawsuit?

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1 Q. Yeah. Or US Beverage. Had US Beverage filed
 2 a prior lawsuit or any action, request for
 3 injunction, anything -- any legal filing in
 4 any state anywhere with any attorney?

5 A. **No.**

6 Q. Move on. Let me ask you a little bit about
 7 Cool Tropics. When you were selling Cool
 8 Tropics' products, did you pay a case
 9 up-charge to the owner of the Cool Tropics
 10 brand?

11 A. **We paid a fee to use the Cool Tropics.**

12 Q. Brand? Yes?

13 A. **Yes. To use that label.**

14 Q. Okay. And was that in addition to the cost of
 15 the actual product itself?

16 A. **Correct.**

17 Q. Do you recall what that case up-charge or what
 18 the charge would have been to use the Cool
 19 Tropics label?

20 A. **No. When we bought Tropical Perfections,**
 21 **there was a case price of -- if I'm not**
 22 **mistaken, it was around 32 or \$34 a case.**
 23 **After we acquired Tropical Perfections, we**

1 dropped that case price actually down to
2 around 16 or \$17, is my recollection. And I
3 may be off a little bit.

4 Q. How much of the 16 or \$17 per case went to the
owner of the Cool Tropics' brand?

6 A. I think at the time, we agreed to pay -- we
7 paid it in the form of a margin, like, a
8 certain percentage. And I do not recall that
9 percentage. And, again, it was agreed upon
10 because when we had taken over Tropical
11 Perfections, some of that distribution was
12 already in place. We felt it was prudent to
13 keep those customers using that same product
14 brand name.

15 Q. So you can't today tell us what -- what was
16 the charge for using the brand?

17 A. No. Not right now I couldn't.

18 Q. When you say it was a margin, was it margin
19 over and above the 16 or \$17 a case?

20 A. I think that was inclusive, but, again, I'm
21 not sure.

22 Q. And did Supreme Beverage make the product for
23 Cool Tropics you were selling?

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1 A. Well, actually Supreme Beverage manufactured
2 that product for us, and Cool Tropics agreed
3 to move their business over there with us at
4 the same time.

5 Q. Okay.

6 A. So Supreme and Tom Clark worked on those
7 products, getting them right, and then Cool
8 Tropics actually in its own distribution
9 followed suit and moved to Supreme with us in
10 order to gain the same pricing we were
11 getting, which was better than what they were
12 getting.

13 Q. Okay. And we saw earlier Defendants'
14 Exhibit 16, which is -- we talked about
15 before, which, basically, informed Gary Dukes
16 of the 1.20 increase or the case up-charge.
17 Would there have been a similar document sent
18 earlier regarding your relationship with Cool
19 Tropics?

20 A. I could not state that. I'm not sure.

21 Q. Is it possible there was a document that was
22 sent to Supreme informing them of what the
23 case up-charge would be?

1 A. I'm just unaware of it.

2 Q. This case up-charge of \$1.20 per case for
3 Juice Alive, do you contend that's not a fair
4 case up-charge? And I'm not talking about the
5 ownership of the IP, but I'm talking about in
6 terms of buying a product in the marketplace.
7 You know, whether you're buying Cool Tropics
8 or you're buying Juice Alive or some other --
9 some other product in the marketplace that's a
10 slush product that you're paying a case
11 up-charge to use a brand. Do you contend that
12 \$1.20 case up-charge for a case of this juice
13 product is unreasonable?

14 MR. GILL: Object to form.

15 A. I contend it's unreasonable when that brand
16 should be an internal issue.

17 Q. Again, I'm not asking you -- I'm not asking
18 you to agree with us as the ownership of the
19 brand. I'm just asking you in terms of if you
20 were negotiating a case up-charge for Cool
21 Tropics or -- or, you know --

22 A. I would find it to be excessive for the
23 services provided, yes.

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1 Q. So if Cool Tropics was charging you \$1.20, a
2 case up-charge --

3 A. We left Cool Tropics because they were
4 charging us for the up-charge in giving their
5 service.

6 Q. Okay. And you don't recall how much they were
7 charging. Was it more or less than \$1.20 per
8 case?

9 A. I don't recall.

10 Q. Okay. What about for this other internal
11 brand you were talking about, the Harvest
12 Pure; is that the brand?

13 A. Correct.

14 Q. Did you pay a case up-charge for Harvest Pure?

15 A. I'm going to say, yes, we probably did. I
16 could not tell you the amount at this time.

17 Q. Do you have any idea?

18 A. I do not.

19 Q. Do you think \$1.20 case up-charge for the
20 Harvest Pure brand, would that be excessive?

21 A. I think at the level that US Beverage has
22 obtained, that that is an internal issue and
23 that almost any price that we would pay for

1 **just a name -- I can't really answer that, to**
2 **be honest.**

3 **Q.** But you're aware of the market, aren't you?
4 You've been involved with the juice product
5 business for many years, you say?

6 **A.** Yes.

7 **Q.** And is there not, like, a common price for a
8 case up-charge in the marketplace?

9 **A.** Not to my knowledge.

10 **Q.** In your complaint you allege that Mr. Walker
11 shirked his duties between May and
12 August 2005?

13 MR. GILL: Object to the form. Is
14 that the exact language?

15 **Q.** I believe it's a quote from the complaint.

16 MR. GILL: It may be, but I have no
17 memory of it.

18 **Q.** Are you -- do you remember that? Do you have
19 any allegations that Mr. -- do you allege that
20 Mr. Walker shirked his duties as an officer of
21 the corporation, US Beverage?

22 **A.** I need for you to define shirked for me.

23 **Q.** That's fine. We'll go on, then. Do you

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1 allege that Mr. Walker failed to perform his
2 duties as an employee of the company, US
3 Beverage? Again, let's talk about prior to
4 July of 2005, prior to the salary dispute.
5 Let's just talk from the point he became
6 associated as an employee of the company up
7 until July of 2005.

8 **A.** I think I've stated previously that we were
9 very dissatisfied with his performance as an
10 officer and an employee of the company.

11 **Q.** Prior to July of 2005, do you know if
12 Mr. Walker was reimbursed for expenses that he
13 turned in to the company?

14 **A.** Without having any documentation on which
15 specific expenses, I couldn't answer.

16 **Q.** Do you have any records showing customers lost
17 by US Beverage as a result of any alleged
18 competition from -- from Mr. Walker or from
19 Trident Marketing?

20 **A.** I mean, how would that be documented?

21 **Q.** Well, I'm just asking you.

22 **A.** Do we have any records?

23 **Q.** I'm just trying to find -- you know, identify

1 documents or anything you have that would be
2 evidence in this case.

3 **A.** I would think that any -- you know, obviously,
4 any business that we -- that we did have that
5 they now possess would be evidence of that or
6 any bid that Juice Alive, its representatives
7 or distributors competed in would obviously
8 indicate loss of revenues and business based
9 on that.

10 **Q.** Let me show you a document I'm going to label
11 as Defendants' Exhibit 18. And this is part
12 of the production that we received from your
13 attorney. And ask you if you can first
14 identify it.

15 (The referred-to document was
16 marked for identification as
17 Defendants' Exhibit No. 18.)

18 **A.** It looks like a QuickBooks production of some
19 sort of account list.

20 **Q.** Okay. Did you produce this for your
21 attorneys?

22 **A.** This would have been produced by myself or Tom
23 Clark, I would imagine. I did not personally

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1 produce this.

2 **Q.** Okay. And I notice on here there's some names
3 that are struck through. Do you know why
4 those names were --

5 **A.** No. I did not generate this document, so I
6 could not answer that.

7 **Q.** Do you know the significance of this document?

8 **A.** I'm unaware of it.

9 MR. GILL: Do you think the name is
10 actually struck through,
11 Raymond?

12 MR. JACKSON: Well, the document I
13 received looked just like
14 this. There are names that
15 were -- maybe they were
16 highlighted. I don't know.
17 It looked to me like it was an
18 attempt to totally strike
19 through them.

20 **Q.** For instance, Booneville-Anderson Elementary
21 School, do you have any idea why that would be
22 either highlighted or struck through?

23 **A.** I have no knowledge of this document at all.

1 A. You know, at one time, Slush Puppie, back when
2 I first got started with this, had 100 percent
3 product, I believe. Then they went to a
4 50 percent product. So were they perceived to
5 be 100 percent juice? I think it depends on
6 the market and what particular line that
7 distributor really focused on.

8 Q. Okay. Well, let's keep -- any other -- I
9 think you mentioned, is it Ice Makers; is
10 that --

11 A. Ice Makers.

12 Q. Dispensing Systems. You've talked about
13 various incarnations of Juice Alive?

14 A. Yeah. Buffalo Rock.

15 Q. Buffalo Rock?

16 A. Uh-huh.

17 Q. Is that the company that also distributes
18 Pepsi?

19 A. Yeah. They do distribute Pepsi.

20 Q. Okay. And you mentioned Slush Puppie?

21 A. Correct.

22 Q. Any other competitors or major competitors in
23 the marketplace?

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1 A. There's several others, Sunshine Beverage.
2 There's several other competitors that may be
3 much of a smaller scale. There's another one
4 out of Pensacola, Florida, Damon's, which
5 touts 100 percent all natural. There's
6 several others that we -- you know,
7 different -- different markets we've -- we see
8 different competitors.

9 Q. Do you bid against these competitors?

10 A. It depends on the market and depends on the
11 product.

12 Q. What about for the school segment of your
13 business?

14 A. Again, depends on the market. Different
15 markets require bids. Some require just a
16 sales call or a pilot program or different
17 things. So there's obvious ways -- I'm aware
18 of some markets where they can put multiple
19 vendors in.

20 Q. What about the Mississippi market? Is that a
21 market that's bid for schools?

22 A. And off the top of my head, I would have to
23 look at data. Some do require a bid, it's my

1 understanding. Some do not.

2 Q. Have you recently lost any bids to any of
3 these competitors we've just listed?

4 A. I would have to go through some notes and talk
5 to some salespeople to find out which markets,
6 which competitors, which bids. I'm not -- my
7 head is a small attic.

8 Q. Okay. In your complaint you allege that
9 Mr. Walker has caused and continues to cause
10 you to lose customer sales. How is Mr. Walker
11 continuing to cause you to lose customer
12 sales?

13 A. Well, you know, we view that any reduction in
14 price per case on a bid that we won would be a
15 continual loss. We also contend that any
16 business that Mr. Walker created using the
17 Juice Alive name, which we feel is
18 intellectual property of ours, is business
19 that we should have had, and it's an ongoing
20 loss. Then any place that he's created a
21 competitive situation that has taken business
22 would obviously be considered a loss. And,
23 again, I would have to go case-by-case through

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1 a lot of documentation to -- you know, to give
2 you specific examples.

3 Q. Are you alleging that Mr. Walker, in the
4 various incarnations of Juice Alive, is able
5 to manipulate the market price for fruit juice
6 products?

7 A. When you say "manipulate the price," I think
8 I'm understanding, but I want to make sure.

9 Q. Okay. You said a few minutes ago any instance
10 where you allege your competition from
11 Mr. Walker you get paid less from a
12 customer --

13 A. Uh-huh.

14 Q. -- you think that's damage. And what I'm
15 asking is in terms of doing business in the
16 marketplace, is Mr. Walker's company, is it
17 able to set the market price for your product,
18 for the juice product.

19 A. I think of -- if we're in a situation and we
20 have a relationship with a customer, we have a
21 price that we've gone in at and he sends a
22 flyer or a letter stating that he can deliver
23 that product at a lower price, that would